

OGC HAS REVIEWED.

20 February 1951

MEMORANDUM FOR MR. HOUSTON

SUBJECT: Appointment of [REDACTED]

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1. This memorandum concerns the proposed appointment of [REDACTED] who was retired in 1947 on orders issued under the provisions of Section 1251, Revised Statutes (10 USCA 933), which provides as follows:

"When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers" (Emphasis added).

This particular law was repealed by the Career Compensation Act of 1949, but its appeal is of no significance insofar as our problem is concerned. See 30 Comp. Gen. 40, at 45.

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2. The dual compensation laws prohibit the holding of additional offices, but provide for an exception in the case of retired officers of the Army who have been retired for "incapacity incurred in the line of duty" (5 USCA 62). Since [REDACTED] incapacity is the "result of an incident of service," it would seem to have been "incurred in the line of duty." The following quotation supports this conclusion:

"The finding by the Army retiring board that the incapacity of the officer concerned was the result of an incident of service is in legal effect tantamount to a finding that such officer is disabled and that his disability was suffered 'in line of duty from disease or injury while so employed' . . . " (SPJGA 1946/2478, 10 April 1946; JAG Bulletin, Vol V, No. 4 Sec. 1117, April 1946).

The above holding referred to the Act of 3 April 1939, as amended (10 USCA 456), but the acts are sufficiently similar to indicate the view of the JAG in such cases.

3. To make certain the above view has not changed, I spoke to Major Meeting, of Army JAG. He informed me that JAG considers "result of incident of service" to mean the same as "incurred in the line of duty." He added that he knew of no ruling by the Comptroller General on this specific problem.

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4. I also discussed the problem with Colonel Wilson of the Retired Officers' Disability Unit of AGO (Code 131, Ext. 71911). He said that before an officer can be retired for disability which is an "incident of service," the disability absolutely must have been "incurred in the line of duty." He said "incident of service" is merely a standard phrase used by retirement boards, and that it is considered synonymous with "line of duty."

5. Another indication of the Army's interpretation of "line of duty" is found in this National Guard Regulation:

"The term 'in line of duty' does not mean merely that the person was on a duty status at the time the injury was suffered or disease incurred, but that the injury or disease . . . was incident to such duty."

The quotation is taken from 11 Comp. Gen. 483, at 485.

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6. However, if any difficulty arises over the problem of appointing [REDACTED] the financial issue will be settled by the Comptroller General, who has the power to declare the appointment void ab initio, and therefore to consider the payment of salary illegal from the date of appointment (21 Comp. Gen. 1129). Consequently, [REDACTED] must be able to convince the Comptroller General that "result of an incident of service" and "incurred in the line of duty" are synonymous.

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7. So far as I have been able to find, the Comptroller General (has never ruled on this precise issue. There are, however, two decisions which interpret "in line of duty" (11 Comp. Gen. 483; 17 Comp. Gen. 1021, at 1026-29). The discussions contained therein are only partially helpful. Another decision mentions "retired for disability incurred as a result of an incident of service" in such a way that it appears synonymous with "incurred in line of duty" (30 Comp. Gen. 40).

8. I also discussed the problem with Mr. Carl P. Friend, GAO specialist on personnel matters. He knows of no case in which the Comptroller General has distinguished "incurred in the line of duty" and "result of an incident of service." He agreed, but only informally, that the terms appear synonymous.

9. Another provision of the dual compensation laws provides that if the retired rate of pay exceeds \$3,000 per annum, the retired officer shall receive only one pay (5 USCA 59a). However, this does not apply to officers who have been "retired for disability incurred in combat."

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10. The General's correspondence indicates his illness was diagnosed as arterio sclerosis of the coronary artery. It seems highly improbable that such an ailment was incurred in combat, but I would hesitate to call it impossible. (Incidentally, a case wherein a "heart block" was considered in line of duty is discussed in a Comptroller General's decision of 27 Nov. 1946, B-59974). In the final analysis, this problem can be settled only by Army officials, since it is within their power to withhold the General's retirement pay.

11. The Judge Advocate General has held that if there was a direct causal relationship between enemy action and an officer's disability, said disability should be regarded as having been incurred in combat. (JAGA 1947/1186, 13 Feb 1947; JAG Bulletin, Vol VI, No. 2, p. 54, 1947).

12. The authority of an agency to employ a retired officer is discussed in an opinion of the Attorney General set forth in 39 Op. A. G. 94.

13. CONCLUSIONS:

1. It is the opinion of the undersigned that CIA has the authority to appoint [REDACTED]

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2. Assuming [REDACTED] is appointed, the problem of forfeiture of his retirement pay depends on any causal relationship between enemy action and his disability. This is a problem for [REDACTED] and the Army.

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cc: Comptroller
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